

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
APPENDIX**



**Docket  
No. 74-1081**

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**IN THE  
United States Court of Appeals  
For the Second Circuit**

UNITED STATES OF AMERICA,

*Appellant.*

B

WILLIAM JEROME HARMON,

*Appellee.*

**On appeal from the United States District Court  
Northern District of New York**

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**APPENDIX FOR APPELLANT,  
UNITED STATES OF AMERICA**

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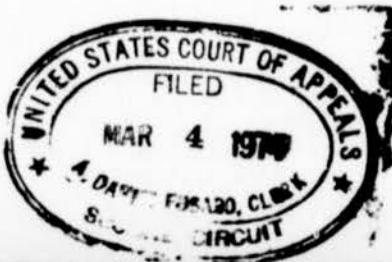
JAMES M. SULLIVAN, JR.  
United States Attorney  
Northern District of New York

EUGENE WELCH  
Assistant United States Attorney  
Federal Building  
Syracuse, New York 13201  
(315) 473-6660

*Attorneys for Appellant.*

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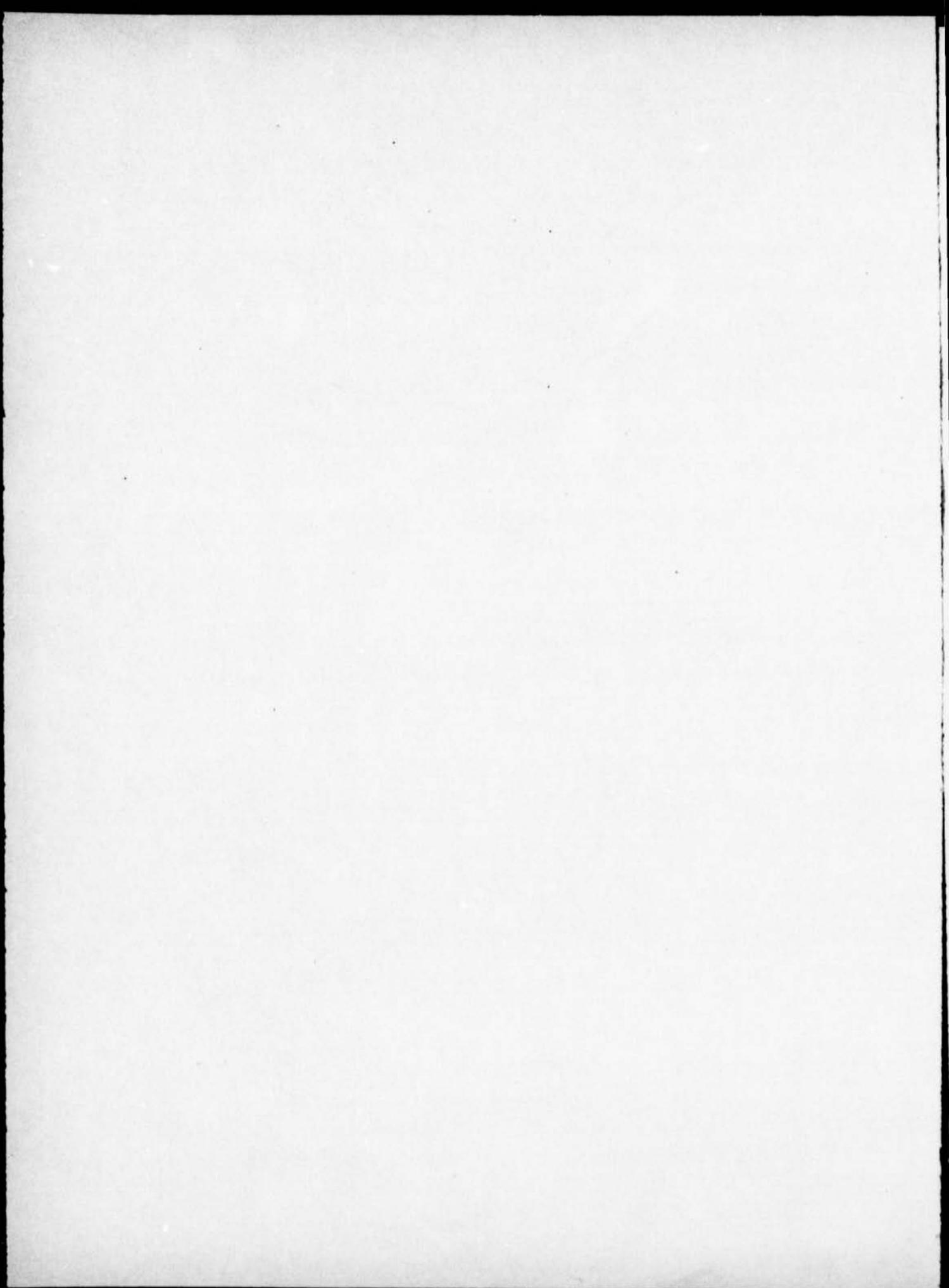
SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.  
(6427)



**PAGINATION AS IN ORIGINAL COPY**

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## Indictment.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

WILLIAM JEROME HARMON

Criminal No. 73-CR-95

Vic: 18 USC 702 and 912.

I N D I C T M E N T

COUNT I

THE GRAND JURY CHARGES:

On or about the 5th day of March, 1973, in the Northern District of New York, WILLIAM JEROME HARMON, wilfully and knowingly did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is, a Sergeant in the United States Air Force and did falsely take upon himself to act as such in that he falsely stated to William Pennella that he was a Sergeant in the United States Air Force currently on leave, and in such pretended and assumed capacity WILLIAM JEROME HARMON, at the time and place aforesaid did falsely pretend to William Pennella to be a recently returned Vietnam Prisoner of War;

All in violation of Title 18, United States Code, §912.

COUNT II

THE GRAND JURY FURTHER CHARGES:

On or about the 23rd day of March, 1973, in the Northern District of New York, WILLIAM JEROME HARMON, wilfully and knowingly did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is, a Sergeant in the United States Air Force, and did falsely take upon himself to act as such in that he falsely stated to Elton Charles Klein that he was a Sergeant in the United States Air Force currently on leave, and in such pretended and assumed capacity, WILLIAM JEROME HARMON, at the

Indictment.

time and place aforesaid, did falsely pretend to Elton Charles Klein to be a recently returned Vietnam Prisoner of War;  
All in violation of Title 18, United States Code, §912.

COUNT III

THE GRAND JURY FURTHER CHARGES:

On or about the 23rd day of March, 1973, in the Northern District of New York, WILLIAM JEROME HARMON, wilfully and knowingly and without authority, did wear the official uniform of a Sergeant of the United States Air Force;

All in violation of Title 18, United States Code, §702.

COUNT IV

THE GRAND JURY FURTHER CHARGES:

On or about the 23rd day of March, 1973, in the Northern District of New York, WILLIAM JEROME HARMON, wilfully and knowingly, did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is a Sergeant in the United States Air Force, and did falsely take upon himself to act as such in that he falsely stated to Thomas Cawley that he was a Sergeant in the United States Air Force currently on leave, and in such pretended and assumed capacity WILLIAM JEROME HARMON, at the time and place aforesaid did falsely pretend to Thomas Cawley to be a recently returned Vietnam Prisoner of War;

All in violation of Title 18, United States Code, §912.

COUNT V

THE GRAND JURY FURTHER CHARGES:

On or about the 23rd day of March, 1973, in the Northern District of New York, WILLIAM JEROME HARMON, wilfully and knowingly and without authority, did wear the official uniform of a Sergeant of the United States Air Force;

All in violation of Title 18, United States Code, §702.

## Indictment.

COUNT VI

## THE GRAND JURY FURTHER CHARGES:

On or about the 24th day of March, 1973, in the Northern District of New York, WILLIAM JEROME HARMON wilfully and knowingly did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is a Sergeant in the United States Air Force, and did falsely take upon himself to act as such in that he falsely stated in the presence of Elton Charles Klein that he was a Sergeant in the United States Air Force currently on leave, and in such pretended and assumed capacity WILLIAM JEROME HARMON, at the time and place aforesaid did falsely pretend to be a recently returned Vietnam Prisoner of War;

All in violation of Title 18, United States Code, §912.

COUNT VII

## THE GRAND JURY FURTHER CHARGES:

On or about the 24th day of March, 1973, in the Northern District of New York, WILLIAM JEROME HARMON wilfully and knowingly and without authority did wear the official uniform of a Sergeant of the United States Air Force;

All in violation of Title 18, United States Code, §702.

A TRUE BILL

*S. C. L. - Unreadable*  
\_\_\_\_\_  
FOREMAN OF THE GRAND JURY

*S. C. L. - Unreadable*  
\_\_\_\_\_  
UNITED STATES ATTORNEY

Defendant's Notice of Motion and  
Supporting Affidavit of Counsel.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

NOTICE OF MOTION

-against-

Criminal No. 73-CR-95

WILLIAM JEROME HARMON

S I R:

The defendant moves the Court as follows:

1. To dismiss Counts I, II, IV and VI of the indictment on the ground that said Counts do not state facts sufficient to constitute an offense against the United States as more clearly appears in the affidavit of David M. Garber annexed as Exhibit "A".
2. For an extension of time to move with respect to the indictment and for such other and further relief as to the Court may seem just and proper.

BOND, SCHORNECK & KING  
By   
Partner  
Attorneys for Defendant  
Office and P. O. Address  
One Lincoln Center  
Syracuse, New York 13202  
Tel. (315) 422-0121

PLEASE TAKE NOTICE that the undersigned will bring the above motion on for a hearing before this Court at the Courtroom for the United States District Court for the Northern District of New York in the Main Post Office Building, City of

**Defendant's Notice of Motion and  
Supporting Affidavit of Counsel.**

Syracuse, Onondaga County, New York on the 12th day of November, 1973 at 2:00 p.m. of that day or as soon thereafter as counsel can be heard.

Dated: November 5, 1973

Signed,

BOND, SCHOENECK & KING  
By *William J. Welch*  
Partner  
Attorneys for Defendant  
Office and P. O. Address  
One Lincoln Center  
Syracuse, New York 13202  
Tel. (315) 422-0121

TO: Eugene Welch, Esq.  
Assistant U. S. Attorney for  
The Northern District of New York  
Federal Building  
Syracuse, New York 13202

Hon. J. R. Scully  
Federal Court Clerk  
U. S. District Court,  
Northern District of New York  
Federal Building  
Utica, New York 13503

Hon. Edmund Port  
U. S. District Court  
Northern District of New York  
Federal Building  
Auburn, New York 13021

Defendant's Notice of Motion and  
Supporting Affidavit of Counsel.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----  
UNITED STATES OF AMERICA

-against-

AFFIDAVIT

WILLIAM JEROME HARMON

-----

STATE OF NEW YORK )  
COUNTY OF ONONDAGA ) SS.:  
CITY OF SYRACUSE )

David M. Garber, being duly sworn, deposes and says:

1. I am an attorney at law and I am associated with the law firm of Bond, Schoeneck & King.
2. On October 15, 1973 I was appointed by Hon. Edmund Port to represent the defendant, William Jerome Harmon.
3. This affidavit is submitted in support of defendant's motion for an order dismissing Counts I, II, IV and VI of the indictment upon the ground that these counts do not state facts sufficient to constitute an offense against the United States. Further, this affidavit is in support of defendant's motion for an extension of time to move with respect to the indictment.

4. Defendant is charged in Counts I, II, IV and VI of the indictment with impersonating a Sergeant in the United States Air Force and for pretending, in his assumed capacity, to be a Prisoner of War from Viet Nam.

5. Defendant, in Counts I, II, IV and VI, has been indicted under the first arm of 18 U.S.C. 912 which requires two elements: (1) Impersonation of an officer and employee of the United States, and (2) An intent to defraud or to deceive another person.

Defendant's Notice of Motion and  
Supporting Affidavit of Counsel.

6. Counts I, II, IV and VI of the indictment do not state facts sufficient to constitute an offense against the United States. These counts allege only one element of 18 U.S.C. 912, the element of impersonation, that defendant Harmon:

"willfully and knowingly did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is, a Sergeant in the United States Air Force and did falsely take upon himself to act as such in that he falsely stated to William Pennella that he was a Sergeant in the United States Air Force currently on leave, and in such pretended and assumed capacity WILLIAM JEROME HARMON, at the time and place aforesaid did falsely pretend to William Pennella to be a recently returned Viet Nam Prisoner of War."

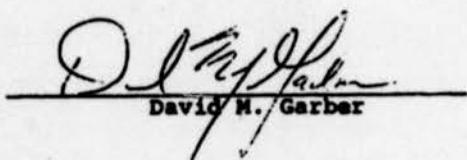
There is no allegation of intent to defraud and, therefore, Counts I, II, IV and VI are insufficient. United States v. Randolph, 460 F.2d 367 (5th Cir., 1972), Form 8, F.R.Cr.P.  
Appendix of Forms.

7. Defendant has advised me that all of his personal papers are in the possession of his wife, who now resides in Binghamton, Broome County, New York. I have been in contact with John Longeretta, the attorney for defendant's wife, and he has informed me that he will forward such personal papers to me immediately. As of the date of this affidavit, I have not received any papers from Mr. Longeretta, which papers I believe are necessary for defendant's defense and which may serve as a basis for additional motions in this matter.

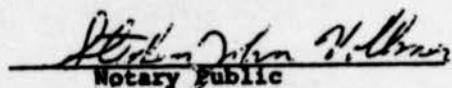
WHEREFORE, deponent, on behalf of defendant, respectfully prays for an order dismissing Counts I, II, IV and VI of the indictment and granting defendant an extension of time to

Defendant's Notice of Motion and  
Supporting Affidavit of Counsel.

move with respect to the indictment and for such other and  
further relief as to the Court may seem just and proper

  
David M. Garber

Sworn to before me this  
5th day of November, 1973

  
Stephen John Vollmer  
Notary Public

STEPHEN JOHN VOLLMER  
Notary Public in the State of New York  
Qualified in Bronx Co. No. 24-9488200  
My Commission Expires March 28, 1974

Government's Response to Motion to Dismiss  
Counts I, II, IV and VI.

U. S. DISTRICT COURT  
N. D. OF N. Y.  
FILED

NOV 9 - 1973 *copy*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

AT 12 O'CLOCK M.

J. R. SCULLY, Clerk

UNITED STATES OF AMERICA

- against -

WILLIAM JEROME HARRON

18 U.S.C.  
GOVERNMENT'S RESPONSE TO  
MOTION TO DISMISS  
COUNTS I, II, IV and VI

Criminal No. 73-CR-95

The government opposes the defendant's motion to dismiss Counts I, II, IV and VI on the basis that the indictment is sufficient on its face and does contain sufficient allegations.

A brief reading of the case relied upon by the defendant, United States v. Randolph, 460 F.2d 367 (5th Cir., 1972), indicates that that decision by the Fifth Circuit was based upon Hones v. United States, 344 F.2d 798 (5th Cir., 1965), which decided the elements required for the second part of a Section 912 violation rather than the first part, which is the part under which this defendant is presently charged.

18 U.S.C. Section 912 defines two separate and distinct offenses, United States v. Lenowitch, 315 U.S. 702, 704-705 (1943), United States v. Nitman, 459 F.2d 451, 453 (9th Cir., 1972).

False impersonation of an officer or employee of the United States is an element of both offenses. The distinctive element of the first offense is acting as the officer impersonated. The distinctive element of the second offense is demanding or obtaining a thing of value. Hones, surely, clearly requires that for the second offense there must be an allegation of intent to defraud.

Government's Response to Motion to Dismiss  
Counts I, II, IV and VI.

As to the first offense under Section 912, there is a split among the circuits with the Second Circuit Court of Appeals remaining silent to date. Randolph, supra, is the Fifth Circuit decision requiring that intent to defraud is an essential element of a part one offense. At least two other circuits and one other district court have ruled that intent to defraud is not an essential element. United States -v- Mitman, 459 F.2d 451, 453 (9th Cir. 1972), <sup>W.C. u.S. 867</sup> cert. denied, 409 U.S. 957; United States -v- Guthrie, 387 F.2d 569, 571 (4th Cir. 1967), cert. denied, 392 U.S. 297 and United States v. Harth, 280 F.Supp. 425, 426-427 (W.D. Okla. 1968).

The government respectfully submits that on the basis of the Mitman, Guthrie, and Harth decisions, and in the absence of any controlling decision by the Second Circuit, this court should deny the motion to dismiss Counts I, II, IV and VI.

Dated: November 8, 1973 Respectfully submitted,

JAMES M. SULLIVAN, JR.  
United States Attorney for the  
Northern District of New York  
Federal Building  
Syracuse, New York 13201  
315 473-6660

By:

  
EUGENE J. WELCH  
Assistant U. S. Attorney

TO: David M. Garber, Esq.  
Bond, Schoeneck & King  
One Lincoln Center  
Syracuse, New York 13202

Hon. Joseph E. Scully, Clerk  
United States District Court  
Northern District of New York  
Federal Building  
Utica, New York 13501

Hon. Edmund Port  
United States District Judge  
USPO & Courthouse  
Auburn, New York 13021

### **Minutes of Hearing in Court Below.**

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF NEW YORK  
3 - - - - - x  
4 :  
5 UNITED STATES OF AMERICA, :  
6 :  
7 - against - : 73-Cr-95

- - - -

## Minutes of Hearing in Court Below.

2.

## 1 APP E A R A N C E S :

2 HON. JAMES M. SULLIVAN, Jr., United States  
3 Attorney for the Northern District of New York,  
4 Federal Building, Syracuse, New York, By: EUGENE  
5 WELCH, ESQ., Assistant United States Attorney appear-  
6 ing in behalf of the Government.

7 - - - - -

8 (Discussion was held between the Court and  
9 Mr. Welch after which the following occurred.)

10 MR. WELCH: It is our position that simply  
11 doing that much, saying "I am the president of the  
12 United States" is sufficient under the first part of  
13 the statute, the act is such. But in addition in  
14 this particular case the question is whether or not  
15 the indictment is sufficient. The indictment  
16 alleges the act as such. If there is something  
17 more required by this defendant to prepare his defense  
18 the indictment may still be sufficient. The fact  
19 of how the act is such can be in a bill of particulars.

20 THE COURT: That may be so but I think the  
21 authority is against you. When you allege the means  
22 I think you are going to be confined to it. And of  
23 course under your theory that merely saying that "I  
24 am the President of the United States" is acting as  
25 such ---

## Minutes of Hearing in Court Below.

3.

1                   MR. WELCH: Assuming of course someone is there  
2                   to hear you.

3                   THE COURT: Oh, yes. Of course. You can't  
4                   be talking to yourself. Then I think you can qualify  
5                   as to some other kind of treatment rather than crimin-  
6                   al. But I am forced to differ with you in that I  
7                   think that Congress didn't intend to make it criminal.  
8                   I don't think they intended to make criminal just  
9                   play-acting.

10                  And in going beyond that, however, and getting  
11                  to the issue that has been raised and about which  
12                  there is a variance in the Circuits is the lack of  
13                  the allegation of intent to defraud.

14                  In analyzing the section as it existed prior to  
15                  the revision, the first and second crimes -- we refer  
16                  to them as separate crimes -- both were induced by the  
17                  statements of persons, in substance that intended to  
18                  defraud by false pretense and so forth. It was taken  
19                  out. The revisers said in view of Lepowitch, which  
20                  really what they said was meaningless but it was not  
21                  that meaningless in Lepowitch because in Lepowitch in  
22                  fact the indictment did have that phrase in. And I  
23                  think what the Court did in Lepowitch was say there were  
24                  two different kinds of fraud involved as between the  
25                  first and second crimes, but that there was still

## Minutes of Hearing in Court Below.

4.

1 present the necessity for an intent to defraud.

2 I don't think that I need go into a lengthy  
3 explanation on that score. I think it suffices to  
4 say I find the Fifth Circuit case United States against  
5 Randolph, 460 Fed.2d. 367 (1972) more persuasive than  
6 United States against Mitman, 459 Fed. 2d. 451, a  
7 Ninth Circuit case I believe ---

8 MR. WELCH: It is either Ninth or Fourth.

9 THE COURT: I think it is Ninth.

10 MR. WELCH: It is the Ninth Circuit.

11 THE COURT: And United States against Guthrie,  
12 387 Fed. 2d. 569, the Fourth Circuit case. And for  
13 the reasons set out in Randolph I find Counts 1, 2 and  
14 4 and 6 defective and the motion to dismiss is granted.

15 A simple order may be prepared.

16 The Clerk should communicate the substance of  
17 the order to -- I think I will do this. I am going to  
18 ask the Reporter to transcribe my remarks in connection  
19 with the decision, file them with the Clerk of the  
20 Court together with a copy for assigned counsel.

21 The Clerk of the Court is to forward the copy  
22 for assigned counsel to Mr. Gerber, with instructions  
23 to prepare a simple order dismissing Counts 1, 2, 4  
24 and 6. The motion with reference to the remaining  
25 counts is granted. Motions may be made returnable

## Minutes of Hearing in Court Below.

5.

1 at the next Syracuse motion day of the court.

2 MR. WELCH: Is Your Honor's ruling based on  
3 cases which say holding himself out as a Sergeant he  
4 must do something beyond that?

5 THE COURT: Sure.

6 MR. WELCH: There are two problems to the ruling  
7 that we will have to litigate.

8 THE COURT: It may solve all the problems.

9 All right.

10 - - - - -

11 (Whereupon the above-entitled matter was  
12 ended.)

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## Minutes of Hearing in Court Below.

6.

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REPORTER'S CERTIFICATION

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4

I, F. ROBERT JORDAN, Official Court Reporter  
for the United States District Court in and for the  
Northern District of New York, do certify the fore-  
going to be a true and accurate transcription of  
the stenographic minutes as taken by me during the  
aforesaid proceedings.

11

12

13

  
F. Robert Jordan  
Official Court Reporter

14

Albany, N. Y.  
November 29, 1973.

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**Order of Court Below Dismissing Counts I, II, IV and VI.**

At a Motion Term of the United States District Court for the Northern District of New York held at Syracuse, New York on the 12th day of November, 1973

PRESENT: Hon. Edmund Port, District Judge Presiding

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

**UNITED STATES OF AMERICA**

-against-

**WILLIAM JEROME HANSON**

**ORDER**

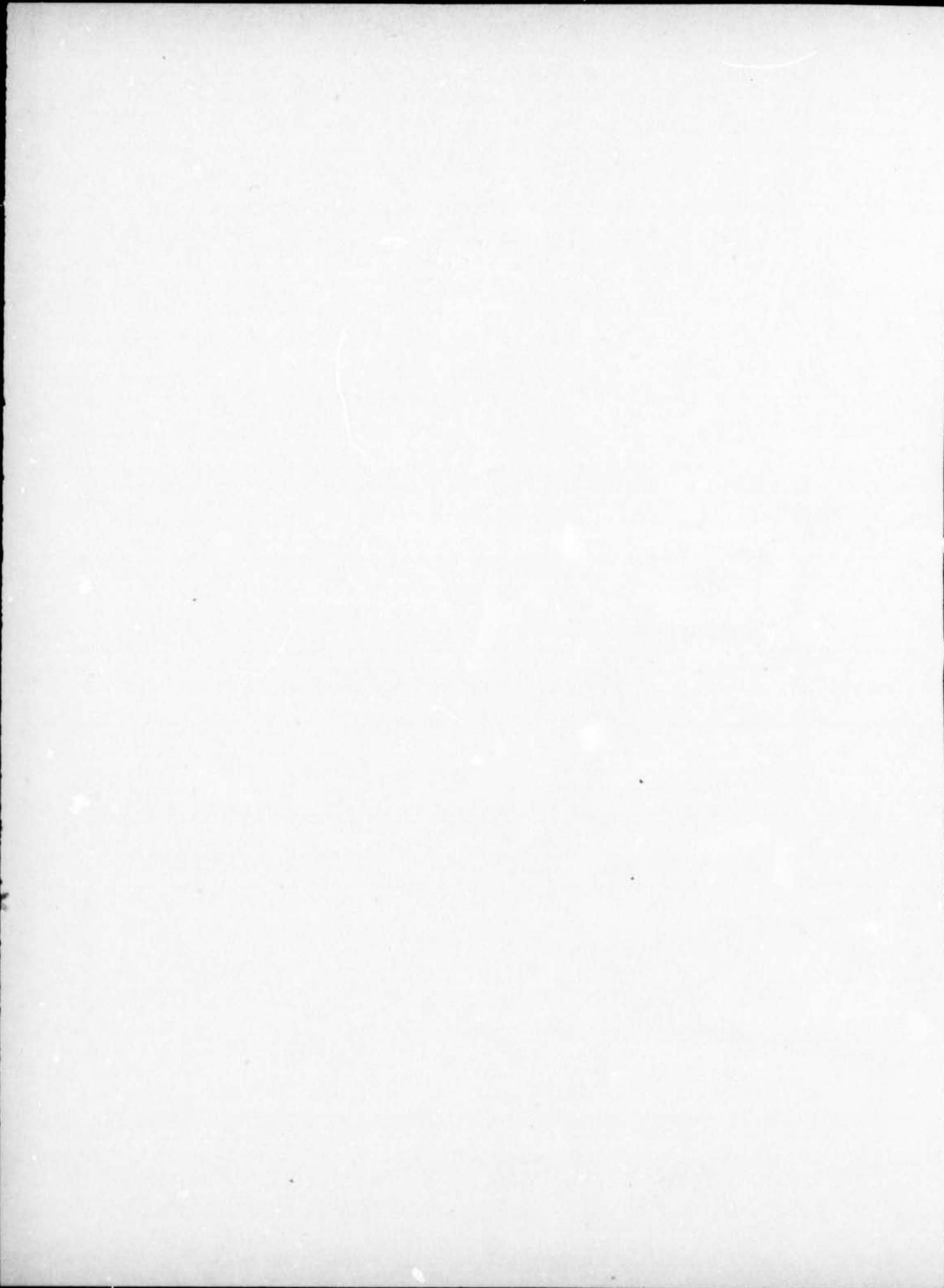
**Criminal No.**

**73-CR-95**

The defendant having moved for an order to dismiss Counts I, II, IV and VI of the indictment on the ground that said Counts do not state facts sufficient to constitute an offense against the United States and for an order for an extension of time to move with respect to Counts III and V of the indictment, and said motion having come on to be heard before this Court on the 12th day of November, 1973,

NOW, upon reading the indictment and the motion papers of the defendant, dated November 5, 1973, including the affidavit of David M. Garber, Esq., and the responsive memorandum of the United States Attorney for the Northern District of New York, and after hearing Eugene Welch, Esq., Assistant United States Attorney for the Northern District of New York, in opposition to defendant's motion, and due deliberation having been had, it is

ORDERED that the said motion be, and the same hereby is granted and it is further



Order of Court Below Dismissing Counts I, II, IV and VI.

ORDERED that Counts I, II, IV and VI of the indictment be dismissed and that a judgment dismissing said Counts of the indictment be entered by the Clerk of this Court and it is further

ORDERED that defendant have an extension of time until January 14, 1974 to move with respect to Counts III and V of the indictment.

Dated:

S/Edmund P. T.  
District Judge

E N T E R :

Auburn, N.Y.  
December 15, 1973